2014 WL 3741828 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

David L. ROSEMAN, Appellant,
v.
Jerel Paul ROSEMAN, Appellees.

No. 2014-P-0455.
July 18, 2014.

On Appeal from a Judgment of the Middlesex Superior Court

Brief of Appellant David L. Roseman

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***1 III. Statement of the Issue Presented for Review**

This appeal presents the important legal issue of whether an attorney-in-fact, acting under the powers granted by his principal under a durable power of attorney, can use the principal's assets for his individual, personal benefit *without* explicit and specific authority to do so found within the four corners of the power of attorney document.

In addition, this appeal presents the question of whether the Superior Court can rely upon the opinion testimony of lay witnesses (that is, non-medical expert witnesses) to establish a party's mental condition, and whether such testimony can outweigh uncontroverted documentary medical evidence of the party's mental condition, in order to determine the party's capacity to contract and make gifts.

Finally, this appeal presents the question of whether a durable power of attorney executed after a party has been determined to lack the capacity to "make, or communicate, decisions relative to her health care" can be properly used by the attorney-in-fact to use the principal's assets for his individual, personal benefit.

***2 IV. Statement of the Case**

Plaintiff-Appellant David L. Roseman ("David") filed this action in the Middlesex Superior Court on August 30, 2010, asserting claims relating to the actions of his brother, Defendant-Appellee Jerel Paul Roseman ("Jerel") with respect to the assets of their mother, Mollie Roseman ("Mollie"), during the final years of Mollie's life. (App. Vol. I at 1.)[1] David asserted claims for declaratory judgment of the parties' rights in the certain real estate and financial assets (Count I); resulting and/or constructive trust with respect to real estate assets (Count II); resulting and/or constructive trust with respect to financial assets (Count III); breach of fiduciary duty (Count IV); breach of contract (Count V); injunctive relief (Count VI); and intentional interference with inheritance (Count VII). (App. Vol. I at 14-15, 26.)

***3** The Middlesex Superior Court (Salinger, J.) conducted a four-day bench trial from October 7-10, 2013. (App. at Vol. II) On October 16, 2013, the Superior Court held a hearing in which the Court delivered its Findings of Fact and Conclusions of Law. The Superior Court found that Mollie intended to give all of her assets to Jerel, and that Jerel was authorized by the terms of the durable power of attorney executed by Mollie, naming Jerel as Mollie's attorney-in-fact, to make gifts of Mollie's assets to himself. (App. Vol. I at 41-72.) Judgment entered in favor of Jerel on October 17, 2013. (App. Vol. I at 73.)

David timely filed a Notice of Appeal of the Middlesex Superior Court's judgment, and now submits the issues identified above for determination by this Court. (App. Vol. I at 75.) In addition to this brief, David has also filed an Appendix containing five volumes in accordance with Mass. R. App. P. 18.

V. Statement of the Facts Relevant to Issues Presented for Review

David and Jerel are the only children of Robert Roseman ("Robert") and Mollie. (App. Vol. I at 43; App. Vol. II at 18:1-36.) Robert passed away in 1992. ***4** (App. Vol. I at 43; App. Vol. II at 22:1-43.) Mollie passed away on August 11, 2008. (App. Vol. I at 43; App. Vol. V at 329.)

In 1981, Robert retired from the auto parts business that he operated at the property located at 138 Waverly Street and 115R Beaver Street, Framingham (together, the "Framingham Properties") and transferred the operating business to Jerel and David. Robert and Mollie continued to own the Framingham Properties. (App. Vol. I at 44, 47; App. Vol. II at 20:1-39.)

After Robert's retirement, Robert and Mollie moved to Florida. (App. Vol. I at 46; App. Vol. II at 20:1-39.) After Robert's death, Mollie remained in Florida. (App. Vol. II at 24:1-48.) Mollie suffered a broken hip in 2001 and a second broken hip in 2002, after which she could no longer walk without a walker. (App. Vol. I at 49; App. Vol. II at 64:1-127, 107:2-30, 127:2-69). In 2003, Mollie returned to Massachusetts to live as a result of her declining health, and lived in Jerel's home. (App. Vol. I at 49; Vol. II at 136:2-07.)

By 2006, Mollie was suffering from dementia, as well as a variety of other age-related ailments. ***5** (App. Vol. I at 49-50; App. Vol. II at 27:1-53.) On October 30, 2006, Mollie fell from bed, striking her head, and had to be hospitalized. (App. Vol. I at 50; App. Vol. II at 18:1-36.) She was admitted to MetroWest Hospital (Leonard Morse Hospital). (App. Vol. I at 50; App. Vol. II at 26:1-51.) She was suffering from confusion resulting from, among other things, low blood sugar. (App. Vol. I at 50; App. Vol. II at 343:26.) An MRI revealed a large mass compressing Mollie's brain stem, which appeared to be a meningioma, which is a tumor arising from the tissue covering the brain stem. (App. Vol. I at 50; App. Vol. II at 339:18.)

On November 1, 2006, Mollie was transferred from MetroWest Hospital to the Brigham & Women's Hospital. (App. Vol. I at 51; App. Vol. II at 26:1-51; App. Vol. IV at 127-29.) Futher testing conducted there confirmed that Mollie had a meningioma, and a shunt was inserted to drain excess fluid from the inside of Mollie's skull. (App. Vol. I at 51; App. Vol. II at 78:1-156.) The shunt was removed after five days. During this time, Mollie's cognitive condition varied. (App. Vol. I at 51.)

***6** On November 9, 2006, Mollie was transferred to the Youville Rehabilitation Hospital. (App. Vol. I at 51, 153.) While at the Youville Hospital, Mollie was often disoriented and confused. (App. Vol. I at 191.) On November 15, 2006, the Youville Hospital nursing records indicate that Mollie was confined to bed during the morning and afternoon shifts, and was "disoriented/ confused" during that time. (App. Vol. I at 191.) A record of a visit and evaluation by Dr. Susan Wang, M.D., which was logged at 1:02PM, indicated that Mollie was "awake, smiling, falling back to sleep before answering some questions." (App. Vol. I at 192.) The records from the early morning shift indicate that Mollie was awake but disoriented. (App. Vol. I at 195.) The records from the afternoon shift indicate that Mollie was "disoriented most of the time" and that her son was in attendance. (App. Vol. I at 197-98.) The late afternoon shift records also indicate that Mollie was disoriented. (App. Vol. I at 199.) Other notes that day indicate that Mollie did not recognize her health care providers, but accurately remembered that her son had been to visit. (App. Vol. I at 193.)

***7** During that same afternoon, according to the testimony of Jerel and Saul Ostroff ("Attorney Ostroff"), the attorney who represented Mollie and still represents Jerel, Mollie was visited by Jerel and Attorney Ostroff. (App. Vol. I at 51, 195; App. Vol. II at 1-125, 65:1-129.) Jerel and Attorney Ostroff further testified that Mollie asked Jerel to leave her alone with Attorney Ostroff so that she could have a private discussion with Attorney Ostroff. (App. Vol. I at 51; App. Vol. II at 65:1-129, 79:1-157.)

Attorney Ostroff testified that, once Jerel left, Mollie executed (i) a deed conveying the Framingham Properties to Jerel for no consideration; and (ii) two Durable Powers of Attorney (the "DPOAs") appointing Jerel as her attorney-in-fact and granting Jerel authority to assume control of Mollie's financial affairs. (App. Vol. I at 51, 81-91; App. Vol. II at 65:1-129, 79:1-157.) Attorney Ostroff used the particular form of durable power of attorney - one without any limitations - because that was the "standard form" on his computer. (App. Vol. II at 160:2-136 - 161:2-137.)

***8** On November 27, 2006, Attorney Ostroff sent requests on behalf of Jerel to Third Federal Savings & Loan, where Mollie had a checking account, and to Washington Mutual, where Mollie had a checking account and a money market account, requesting that the accounts be closed, and a check for any funds in the account to be sent to Jerel. (App. Vol. I. at 131, 136.)

On December 14, 2006, Dr. William Smith, Mollie's primary care physician, executed a certification that Mollie no longer had the capacity "make, or communicate, decisions relative to her medical care." (App. Vol. V at 261.) The Superior Court found Mollie incapacitated after this time. (App. Vol. I at 58.) On December 18, 2006. Attorney Ostroff received a letter from Washington Mutual indicating that the copied DPOAs were insufficient to authorize the closing of Mollie's account and disbursement of proceeds as requested. (App. Vol. I at 135.) The bank requested a notarized Letter of Instruction from Mollie, along with an original power of attorney, in order to comply with Attorney Ostroff's request. (App. Vol. I at 135.)

***9** On December 27, 2006, Mollie executed two Letters of Instruction (addressed to the banks) and a new durable power of attorney, which again appointed Jerel as her attorney-in-fact, and again granted Jerel authority to assume control of her financial affairs. (App. Vol. I. at 93-95.) These documents were sent by Attorney Ostroff to the banks, which accordingly released the funds as requested. (App. Vol. I. at 132-143.)

Jerel collected "between $300,000 and $400,000" of Mollie's money, and placed it into his own bank accounts, or accounts held jointly by Jerel and Mollie. (App. Vol. I at 60-61.) Some of this money was used to pay for Mollie's home health aides and similar expenses. (App. Vol. I at 60-61.) Jerel gave the balance to himself as a gift, either by using Mollie's funds to pay Jerel's household expenses such as utility bills, or by retaining the cash for himself after Mollie's death. (App. Vol. I at 60-61.)

VI. Summary of the Argument

The Superior Court's ruling that Jerel was authorized by the DPOAs executed by Mollie, naming Jerel as her attorney-in-fact, to make gifts of ***10** Mollie's property to himself for his own individual benefit should be reversed because a grant of authority to an agent to engage in self-dealing transactions for the agent's individual and personal benefit must be explicit and specific, and cannot be implied from general grants of authority in the power. (p. 11-16)

The Superior Court's ruling that Mollie had the mental capacity to make a gift deed of real estate and to grant a durable power of attorney should be reversed because the Superior Court improperly relied on the testimony of lay witnesses to establish Mollie's mental condition, and seemingly disregarded the medical records in evidence that detail the poor state of Mollie's mental condition at the time that she executed the documents. (p. 17-22)

The Superior Court's ruling that Jerel's withdrawal of Mollie's money from various accounts, acting as Mollie's attorney-in-fact, was valid should be reversed because the actual documents that Jerel used to accomplish the withdrawals were signed by Mollie after the date at which the Superior Court found that she no longer had the mental capacity to enter contracts. (p. 22-23)

***11 VII. Argument**

When an appellate court is reviewing the judgment of the Superior Court, or any trial court, the trial judge's findings of fact are accepted unless they are clearly erroneous. *T.W. Nickerson, Inc. v. Fleet Nat'l Bank,* 456 Mass. 562, 569 (2010). A finding is "clearly erroneous" if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *See id.; Crown v. Kobrick Offshore Fund, Ltd.,* 85 Mass.App.Ct. 214, 224 (2014). The trial judge's legal conclusions are reviewed de novo. *T.W. Nickerson, Inc.,* 456 Mass. at 569.

A. The Durable Powers of Attorney did not authorize Jerel, as Mollie's attorney-in-fact, to make gifts to himself from Mollie's assets.

The Superior Court's judgment must be reversed because the DPOAs that were signed by Mollie did not authorize Jerel, in his capacity as Mollie's attorney-in-fact, to make gifts to himself from Mollie's assets. See Gagnon v. Coombs, 39 Mass.App.Ct. 144, 158 (1995).

A power of attorney is a document creating a fiduciary relationship between the principal and the ***12** attorney-in-fact, authorizing the attorney-in-fact to act as the agent of the principal in accordance with the terms of the power. *See* 22 Mass. Practice *Probate Law and Practice* § 43.2 (2013). At common law, the authority of an agent acting under a power of attorney would be terminated by the death or disability of the principal. *See, e.g., Gallup v. Barton,* 313 Mass. 379, 382 (1943).

In 1981, the legislature enacted the Uniform Durable Power of Attorney Act, which permitted the authority of the agent to survive the disability of the principal, if the document creating the power so provided. See 22 Mass. Practice *Probate Law and Practice* § 43.2 (2013). That statute has since been repealed and incorporated into the Massachusetts Uniform Probate Code. G.L. ch.190B, § 5-501 to 5-507.

Because the authority of an agent acting under a durable power of attorney is not terminated by the disability of the principal, the instrument is now widely used as an alternative to conservatorship, as a means of managing the (potentially disabled) principal's property and finances. See 22 Mass. Practice Probate Law and Practice § 43.2 (2013). ***13** However, because of the potentially extremely broad authority granted to the attorney-in-fact under a durable power of attorney, the instrument is recognized to pose the risk of **elder abuse**. Black, Jane A., Note, The Not-so-Golden Years: Power of Attorney, **Elder Abuse**, and Why Our Laws are Failing a Vulnerable Population, 82 St. John's L.R. 289 (2008).

In recognition of the risks posed to a principal by broad authority conferred on an agent, Massachusetts courts have long required that an agent's authority to take actions that are harmful or costly to the principal be both specific and explicit. *See Williams v. Dugan,* 217 Mass. 526, 526 (1914). In Williams, the Supreme Judicial Court held that:

> The power to borrow money or to execute and deliver promissory notes is one of the most important which a principal can confer upon an agent. It is fraught with great possibilities of financial calamity. It is not lightly to be implied. It either must be granted by express terms or flow as a necessary and inevitable consequence from the nature of the agency actually created. Id.

This principle has been extended to authority to make gifts under a power of attorney: the authority to make gifts must likewise be specific and explicit in ***14** the power. *See Gagnon,* 39 Mass.App.Ct. at 158; *Goldstein v. Page*, 78 Mass.App.Ct. 1113 (2010).

In Gagnon, the principal made a decision to sell his real estate. See id. But before the sale could be completed, the principal's agent, acting pursuant to a pre-existing durable power of attorney, conveyed the principal's real estate to a trust that the agent created, and in which the agent held a beneficial interest. See id. at 147-48. The Appeals Court upheld the principal's challenge of the agent's actions, in part because the power of attorney did not specifically authorize the agent to make a gift to herself. [2] *See id.* The Court reasoned:

The sedulous application and uncompromising rigidity of the prohibition against unauthorized fiduciary self-dealing do not flow merely from the interpretive principle that powers of attorney are to be strictly construed to require explicit, and not inferential, grants of “dangerous” agency authority the exercise of which is potentially destructive of the principal's interests. The interdiction has been said to be based upon the highest and ***15** truest principles of morality, but it is equally grounded in the law's prudent “[dis]trust [of] human nature [when] exposed to the temptations” inherent in the fiduciary relationship. *Id.* at 158; citing *Williams,* 217 Mass. at 529-30; internal citations omitted.

The DPOAs signed by Mollie, and utilized by Jerel to make gifts to himself as Mollie's attorney-in-fact, likewise did not specifically and explicitly authorize Jerel to make gifts to himself. (App Vol. I at 85-95.) The DPOAs are simply a boilerplate

document that Attorney Ostroff - who represented both Mollie and Jerel and who continues to represent Jerel - found on his computer. (App. Vol. II at 160:2-136 - 161:2-137.)

Though the DPOAs contain a generic authority "to make gifts to charitable, educational and religious organizations and to members of my family consistent with practices and programs established by me" as well as other "unlimited" powers, the DPOAs do not specifically and explicitly authorize Jerel to make gifts of Mollie's assets to himself. (App Vol. I at 85-95.) Jerel's self-dealing transfers made pursuant to the power were therefore beyond the scope of authority specifically and explicitly granted by the DPOAs. See Gagnon, 39 Mass.App.Ct. at 158.

***16** The Superior Court's findings that Mollie wished and intended to give all of the assets conveyed under the DPOA to Jerel, and approved of Jerel's self-dealing transactions (App. Vol. I at 58-59) are insufficient to establish that those transactions were within the authority granted by the DPOAs because the agent's authority to make gifts of the principal's assets to himself can only be found, specifically and explicitly, within the power of attorney. *See Gagnon*, 39 Mass.App.Ct. at 158.

If an attorney-in-fact is able to establish, as Jerel was in the Superior Court, that such gifts are authorized, based only on a court's assessment of the deceased or disabled principal's intentions through the testimony of the (self-interested) agent and the agent's lawyer, then the protection derived from the requirement that such authority be explicit and specific would be lost, and the potential for **abuse** of the aged and infirm through this device would be greatly increased. Such a result would run directly contrary to over 100 years of agency law in this Commonwealth. *See Williams*, 217 Mass. at 526. The judgment of the Superior Court should accordingly be reversed.

***17 B. The documented medical evidence of Mollie's mental condition establishes that Mollie did not have the mental capacity to contract, or to make gifts, on November 15, 2006, and the Superior Court wrongfully relied on lay witness opinion testimony to find otherwise.**

The Superior Court's judgment should be reversed because the Superior Court wrongfully found that Mollie had sufficient capacity to execute the deed for the Framingham Properties and the DPOAs.

In order to have the legal capacity to execute the DPOAs, Mollie must have had the mental capacity to enter into a contract. *See Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 251 (2008). The mental capacity necessary to make a gift of the Framingham Properties is "testamentary capacity" or the capacity to understand the act of making a gift. *See id.*

In Massachusetts, the lack of mental capacity to enter into a contract can be proved by *either* of two methods. *See Sparrow v. Demonico*, 461 Mass. 322, 328 (2012).[3] The first test, referred to as the "cognitive test," will determine a party to lack the mental ***18** capacity to contract if "the person was of unsound mind, and incapable of understanding and deciding upon the terms of the contract." *Id.* The second test, referred to as the "volitional test," will determine a party to lack the mental capacity to contract if "by reason of mental illness or defect the person is unable to act in a reasonable manner, and the other party has a reason to know" of this condition. *Id.* at 329.

The party's mental condition must be proved through medical evidence. *See id.* at 331. Lay witnesses (that is, non-medical expert witnesses) are "*not competent* to give an opinion as to a party's mental condition." *Id.* (emphasis added).

Thus, in *Farnum v. Silvano*, the Appeals Court found that an aging woman who deeded her house for far less than its value was incapacitated, even though she was alert, cheerful, and "was aware of what was going on" at the time of the transfer, and even though the trial court found that the woman phased in and out of lucidity. See 27 Mass.App.Ct. 536, 538 (1989). The Appeals Court reasoned that capacity to enter into a contract "requires something more than a transient surge of lucidity... [It requires] an ability to ***19** comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences." *Id.*

The Court reasoned further that the woman was **elderly** and suffering from the onset of dementia. Shortly after the disputed conveyance, the woman was found to be incompetent and admitted into a nursing home. *See id.* at 537. The Court therefore concluded that the woman lacked the capacity to enter into the contract, and rescinded the deed. *See id.* at 538.

In this case, the Superior Court relied upon the testimony of Dr. Smith to find that during the period from November 9 to November 20, 2006, "there were times when Mollie was confused and disoriented, but there were other times when she was not confused and disoriented." (App. Vol. I at 57.) The Superior Court then relied on the testimony of Attorney Ostroff to establish that the deed for the Framingham Properties and the DPOAs were executed during a time when Mollie was not confused and disoriented. (App. Vol. I at 58.) Finally, the Superior Court relied on Dr. Smith's assessment of Mollie's medical records, which in Dr. Smith's view showed Mollie's mental condition was better on November 17, 2006 (two days ***20** after the execution of documents) than it had been on November 9, 2006 (the day she was admitted to Youville Hospital). (App. Vol. I at 58.)

Based on this evidence, the Superior Court concluded that Mollie was competent on November 15, 2006, that Mollie understood that she was giving the Framingham Properties to Jerel and not David, and that she understood that by signing the DPOAs she was putting Jerel in control of all of her finances, and was authorizing Jerel to give her property exclusively to himself. (App. Vol. I at 58-59.)

The Superior Court's findings in this regard are in error for several reasons. First, the Superior Court accorded too much weight to the idea that Mollie had intervals of varying lucidity, because "capacity to enter into a contract requires something more than a transient surge of lucidity." *See Farnum,* 27 Mass.App.Ct. at 538.

Second, the Superior Court relied on the testimony of Attorney Ostroff to establish that Mollie had sufficient mental capacity to contract at the time that he had her sign the documents, even though, as a lay witness, Attorney Ostroff is, as a matter of law, ***21** not competent to give an opinion as to Mollie's mental condition. *See Sparrow,* 461 Mass. at 331.

Most significantly, the Superior Court ignored the documented medical records detailing Mollie's mental condition on the day that the deed and DPOAs were signed. Those medical records, kept by the Youville Hospital medical and nursing staff, disclose that Mollie was confined to bed during the morning and afternoon shifts, and was "disoriented/confused" during this time. (App. Vol. I at 191.) Dr. Susan Wang, M.D., logged an evaluation of Mollie at 1:02PM, reporting that Mollie was "awake, smiling, falling back to sleep before answering some questions." (App. Vol. I at 192.)

The records from the early morning shift indicate that Mollie was awake and disoriented. (App. Vol. I at 195.) The records from the afternoon shift indicate that Mollie was "disoriented most of the time" and that her son was in attendance. (App. Vol. I at 197-98.) The late afternoon shift records also indicate that Mollie was disoriented. (App. Vol. I at 199.) Other notes that day indicate that Mollie did not recognize her health care providers, but ***22** accurately remembered that her son had been to visit. (App. Vol. I at 193.)

These medical records show that Mollie was disoriented, unable to recognize people, and unable to answer questions without falling asleep, which, collectively, establish that Mollie "was incapable of understanding and deciding upon the terms of the contract" and indeed demonstrate that on November 15, 2006, Mollie lacked even the capacity to know that she was giving the Framingham Properties to Jerel, and excluding David. *See Farnum,* 27 Mass.App.Ct. at 538; *Maimonides School,* 71 Mass.App.Ct. at 251. The Superior Court's findings otherwise are therefore in error, and should be reversed.

C. The Durable Powers of Attorney that Jerel actually used to gain control of Mollie's assets were executed by Mollie after she was indisputably disabled.

Even if Mollie had the capacity to execute and deliver the DPOAs on November 15, 2006, the Superior Court's judgment must nevertheless be reversed because the Durable Powers of Attorney that Jerel *actually* used to gain control of Mollie's assets were signed well after Mollie had indisputably become incapacitated. *See* ***23** *Maimonides School,* 71 Mass.App.Ct. at 251. As

set forth in detail above, a principal must have the "capacity to transact business, and more specifically the capacity to grasp its significance" in order execute a valid durable power of attorney. *See Krasner v. Berk*, 366 Mass. 464, 467 (1974); *see also Farnum*, 27 Mass.App.Ct. at 538.

Jerel used a power of attorney and a written request for disbursement of funds signed by Mollie, both of which were executed on December 27, 2006, to close out accounts at Third Federal Savings & Loan and Washington Mutual. (App. Vol. I at 132-143.) These documents were executed *after* December 14, 2006, when Mollie's doctor determined that she "lacks the capacity to make, or communicate, decisions relative to her health care" (App Vol. V at 261). Mollie therefore lacked the capacity to direct the disposition of the funds in those accounts. *See Maimonides School*, 71 Mass.App.Ct. at 251. The judgment of the Superior Court should accordingly be reversed.

*24 VIII. Conclusion

For all of these reasons, the Superior Court's decision finding that Jerel, in making gifts of Mollie's property to himself, acted properly under the powers granted by valid durable powers of attorney, and that Mollie had the capacity to give the Framingham Properties to Jerel should be reversed, and Plaintiff-Appellant David L. Roseman prays an Order issue from this Court directing the entry of judgment in favor of David L. Roseman in this manner.

Footnotes

1 Plaintiff-Appellant has filed, along with this this brief: (i) Appendix Volume I, containing the materials required by Mass. R. App. P. 18(a); (ii) Appendix Volume II, containing the trial transcript; and (iii) Appendix Volumes III, IV and V, containing the trial exhibits. Citations to the Appendix ("App.") refer to the volume of the Appendix (e.g., "Vol. I") and the specific page of that volume.

2 Although the Court also found that the agent's authority under the power of attorney had been terminated by the principal's execution of a P&S for the property, the Court found that the lack of specific and explicit authority to make a gift was an independent ground for setting aside the agent's actions. See Gagnon, 39 Mass.App.Ct. at 158.

3 The Superior Court appears to have required David to meet both of these tests in order to establish Mollie's mental incapacity. (See App. Vol. I at 57.) Mental incapacity, however, can be established under using either test. See Sparrow, 461 Mass. at 330-31 (mental incapacity to contract can be established under either the "cognitive test" or the "volitional test").

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